LIBRARY 71 388
SUPREME COURT, U. S.
SEP 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No.

HALCON INTERNATIONAL, INC.,

Petitioner,

against

MONSANTO AUSTRALIA LIMITED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD N. COSTIKYAN
Attorney for Petitioner
345 Park Avenue
New York, New York 10022

LLOYD W. BOWERS
SIDNEY S. ROSDEITCHER
SELVYN SEIDEL
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
I. The decision below conflicts with this Court's construction of the Federal Arbitration Act in *Prima Paint*. This Court should clarify that decision for the benefit of the lower courts	7
II. The decision below creates an irrational distinction between commercial and labor arbitration cases	11
III. The construction given by the Court below to the Federal Arbitration Act will have an adverse and unfair impact on parties to all existing arbitration contracts subject to the Act	15
Conclusion	17

TABLE OF AUTHORITIES

Cases Cited:

Amalgamated Clothing Workers v. Ironall Factories Co., 386 F.2d 586 (6th Cir. 1967) 6, 11–12, 13, 14

International Union of Operating Engineers v. Flair Builders, Inc., 440 F.2d 557 (7th Cir. 1971) .. 6, 11, 13, 14

PAGE

Nortuna Shipping Co. v. Isbrandtsen Co., 231 F.2d 528 (2d Cir.), *cert. denied,* 351 U.S. 964 (1956) 7

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 2, 3, 5, 6, 7, 8, 9

Reconstruction Finance Corp. v. Harrisons & Crosfield, 204 F.2d 366 (2d Cir.), *cert. denied,* 346 U.S. 854 (1953) 7

Ropner, In re, 118 F.Supp. 919 (S.D.N.Y. 1954) 7

Sociedad Armadora Aristomenia Panama, S.A., In re, 244 F.Supp. 653 (S.D.N.Y. 1965) 7
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 12

Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568 (2d Cir. 1968) 9, 10
Trafalgar Shipping Co., Ltd., In re (unreported), 67 Civ. 1985 (S.D.N.Y. 1967) (McLean, J.) 9

Statutory Provisions:

9 U.S.C. §§2 and 4 ..... 26a–27a and *passim*
28 U.S.C. §1254(1) 2
29 U.S.C. §185 ..... 6, 12, 28a

Miscellaneous Sources Cited:

Hearings on S.4213 and S.4214 before Subcommittee of Senate Committee of the Judiciary, 67th Cong., 4th Sess. (1923) 9

IN THE

Supreme Court of the United States

October Term, 1971

No.

HALCON INTERNATIONAL, INC.,

Petitioner,

against

MONSANTO AUSTRALIA LIMITED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Halcon International, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 9, 1971.

Opinions Below

The opinion of the Court of Appeals and the dissenting opinion therein, not yet reported, appear in Appendix A. The opinion of the District Court for the Northern District of Illinois, not yet reported, appears in Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 9, 1971 (Appendix C). A timely petition for rehearing and rehearing en banc was denied on August 11, 1971 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

In affirming a decree compelling arbitration, a divided Court of Appeals held that the District Court properly refused to consider the merits of defenses that laches and estoppel barred enforcement of a commercial arbitration contract, reasoning that under the Federal Arbitration Act (9 U.S.C. §§1-14) such defenses were for the arbitrators, not the court.

The questions presented are:

1. Did this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), overturn *sub silentio* the previously well settled principle that a federal court asked to enforce arbitration under the Federal Arbitration Act sits as a court of equity and as such, must consider traditional equity defenses such as laches and estoppel?

2. Does not the Court of Appeals' construction of the Federal Arbitration Act as immunizing commercial arbitration agreements from equity defenses which would bar enforcement of other types of contracts, conflict with this

Court's conclusion in *Prima Paint* (388 U.S. at 404, n. 12) that the Act was intended to "make arbitration agreements as enforceable as other agreements, but not more so"?

3. Does not the decision below create an irreconcilable conflict with the unanimous federal circuit court decisions in actions to enforce labor arbitration contracts that the issue of laches is for the court?

4. Should the Federal Arbitration Act be construed to leave to the unfettered, unreviewable discretion of the arbitrators the question of whether the party seeking arbitration has so prejudiced the other party's rights to defend itself in arbitration that it is inequitable to allow the arbitration to proceed or should that important threshold inquiry be reserved to the court?

Statutory Provisions Involved

The statutory provisions involved are Sections 2 and 4 of the Federal Arbitration Act (9 U.S.C. §§2 and 4) and Section 301(a) of the Labor Management Relations Act (29 U.S.C. §185(a)). They are set out in Appendix E.

Statement of the Case

In 1962, petitioner contracted to design and engineer a chemical processing plant for respondent. The contract "guaranteed" that certain performance standards would be met. However, if the standards were not met within a specified period the contract required only that "authorized representatives of the [parties] * * * meet to determine a course of action to be followed" (Appendix below, 26a).

The plant did not fully meet performance standards following commencement of its operations in 1964. Beginning in 1965, respondent took over operation of the plant. In July, 1966, petitioner made several proposals for additional investment to meet new performance requirements requested by respondent which in certain respects exceeded the contract standards. On December 22, 1966, respondent advised petitioner that, although it did not question the validity of these proposals, it had decided instead to invest in another process making a profitable co-product. Respondent gave no hint of any possible claim based upon the plant's performance. Rather, it wrote: "We appreciate your comments and your helpfulness along the way on this situation; for Monsanto [respondent] the books are now closed" (Appendix below, 64a-65a).

During the next two years, consistent with this representation, respondent never suggested it had any claims about the plant. Instead, in 1967, respondent sought and obtained petitioner's permission to "cannibalise" the plant, and in 1968, the plant was closed and partly dismantled (Appendix below, 76a-79a).

Then, in January, 1969, concededly for the first time (Appendix below, 45a-46a) and after it had already cannibalized the plant, respondent disclosed that it might make a claim pertaining to the operations of the plant. In December, 1969, one year after the plant was cannibalized and three years after respondent's representation that its books were closed, respondent demanded arbitration claiming that the plant failed to meet performance standards and that it had suffered $10 million damages.

Respondent instituted proceedings in the United States District Court for the Northern District of Illinois to compel arbitration. Jurisdiction was based on the Federal Arbitration Act and diversity. Petitioner opposed enforcement of the arbitration clause on the grounds of laches and estoppel, maintaining that its own rights to make effective use of the arbitration clause and to defend itself had been seriously prejudiced by respondent's delay in disclosing its claims and its representation that its books were closed: For as a result of that conduct, petitioner had lost, for use as evidence, the very plant whose performance was to be the subject of the arbitration.

Petitioner sought to show the District Court that the loss of the plant had deprived it of the principal evidence on such defenses as substantial performance and its claim that respondent was responsible for the plant's failure to operate at optimum capacity. Of equal importance, petitioner sought to show that the loss of the plant had deprived it of its right to show in arbitration that its proposals for plant improvement would have been the appropriate "course of action to be followed" under the agreement. (Appendix below, 58a-63a)

The District Court refused even to consider the merits of petitioner's defense. Without considering the significance of the "saving clause" of Section 2 of the Federal Arbitration Act (9 U.S.C. §2), and purporting to rely on this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), it held that in a proceeding under Section 4 of the Federal Arbitration Act (9 U.S.C. §4) to compel arbitration the issue of whether the party seeking arbitration was barred by laches and

estoppel from invoking the arbitration clause was for the arbitrators, not the court. Accordingly, it enforced the arbitration clause without considering whether respondent's conduct had prejudiced petitioner's rights under that same clause (20a-22a).

On appeal, the Court below affirmed in a 2-to-1 decision. In reaching this conclusion, the majority construed the "saving clause" to preserve for judicial consideration only those defenses which were grounds for rescission of the arbitration contract, but concluded that it did not "save" defenses such as laches or estoppel, which would ordinarily render a contract unenforceable (6a-7a). Like the District Court, the majority found support for its holding in *Prima Paint* (9a, 14a). It refused to apply its own recent decision in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 440 F.2d 557 (7th Cir. 1971) and the Sixth Circuit decision in *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F.2d 586 (6th Cir. 1967), which held that the threshold issue of whether laches bars enforcement of an arbitration contract is for the *court*, on the ground that such a rule applies only in actions to enforce *labor* arbitration contracts under Section 301 of the Labor Management Relations Act (29 U.S.C. §185) and not to *commercial* arbitrations enforceable under the Federal Arbitration Act (8a, 13a).

Chief Judge Swygert dissented. He maintained that the majority too narrowly construed the "saving clause" and that read in context it required the court to entertain equitable defenses to enforcement, including laches and estoppel. In Chief Judge Swygert's view, the majority's reading of the statute was inconsistent with, rather than

supported by, this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Nor could he see any rational justification for treating the question of laches in actions to enforce commercial arbitration contracts differently from the way it is treated in actions to enforce labor arbitration contracts (15a-17a).

Reasons for Granting the Writ

I. The decision below conflicts with this Court's construction of the Federal Arbitration Act in *Prima Paint*. This Court should clarify that decision for the benefit of the lower courts.

Prior to this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the law was settled that in an action to compel enforcement of an arbitration contract a federal court sat in equity and was required to consider equitable defenses to enforcement of such contracts, such as laches. *E.g., Reconstruction Finance Corp.* v. *Harrisons & Crosfield,* 204 F.2d 366, 369-70 (2d Cir.), *cert. denied,* 346 U.S. 854 (1953); *Nortuna Shipping Co.* v. *Isbrandtsen Co.,* 231 F.2d 528 (2d Cir.), *cert. denied,* 351 U.S. 964 (1956); *In re Sociedad Armadora Aristomenia Panama, S.A.,* 244 F.Supp. 653 (S.D.N.Y. 1965); and *In re Ropner,* 118 F.Supp. 919 (S.D.N.Y. 1954).

In 1967, in a 6-to-3 decision, this Court held in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co., supra,* that under the Federal Arbitration Act the question of whether there was fraud in the inducement of an entire agreement containing an arbitration clause was to be decided by the arbitrators, but that the question of whether there was

fraud in the inducement of the arbitration clause itself was to be decided by the court. 388 U.S. at 403-04.

The specific question of whether the equitable defense of laches in the invocation of the arbitration clause should be considered by the court was not presented in *Prima Paint,* or in any other prior case decided by this Court. However, in *Prima Paint,* in reaching the conclusion that the issue of fraud in the inducement of the arbitration clause itself was necessarily for the court, this Court pointed out (388 U.S. at 404, n. 12):

> "As the 'saving clause' in §2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause'."

This reasoning necessarily suggests that other equitable defenses to enforcement such as laches in the invocation of the arbitration agreement, and estoppel, are also for the court. For, to specifically enforce arbitration contracts without regard to defenses such as laches and estoppel—available to bar enforcement of any other type of contract —would indeed elevate arbitration contracts to a special status and make them more enforceable than other types of contracts. Accordingly, the decision below would appear to be directly in conflict with the principles enunciated by this Court in *Prima Paint,* as would its overall construction of the "saving clause" in Section 2 which would preclude from judicial consideration all those legal and equi-

table defenses which would bar enforcement of any other type of contract, unless such defenses also permitted rescission.*

While we believe the principles of *Prima Paint* to be clear, the opinions below and a similar 2-to-1 decision in the Second Circuit, *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (2d Cir. 1968), indicate disagreement among lower federal court judges as to the appropriate interpretation of *Prima Paint.*

Following *Prima Paint,* in the first decision to consider the issue, a federal district court held that *Prima Paint* did not overturn the settled principle that in a proceeding to enforce arbitration under the Federal Arbitration Act, the issue of laches was for the court, not the arbitrators. *In re Trafalgar Shipping Co., Ltd.* (unreported), 67 Civ. 1985 (S.D.N.Y. October 31, 1967) (McLean, J.). On appeal, the Second Circuit reversed in a 2-to-1 decision, Chief Judge Lumbard dissenting. While recognizing that this Court, in *Prima Paint,* did not decide the question, the majority there concluded that the principles of *Prima Paint* required the conclusion that in a proceeding to enforce arbitration, the court could not consider whether laches in the invocation

* The pertinent portion of Section 2 (9 U.S.C. §2) provides that arbitration contracts are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." The Court below believed that the word "revocation" was synonymous with "rescission". This conclusion is not borne out by the legislative history. As one of the Act's sponsors said, "the Court has got to hear and determine whether there is an agreement of arbitration * * * and it is open to all defenses, equitable and legal, that would have existed at law * * *" Hearings on S.4213 and S.4214 before the Subcommittee of the Senate Committee of the Judiciary, 67th Cong., 4th Sess. at 5, 1923. The majority's reading frustrates that intention by leaving arbitration contracts open only to *some* defenses but not others.

of the arbitration contract had so prejudiced a party's ability to defend in arbitration that enforcement was barred. *Tralfalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (2d Cir. 1968). This was the first time that any Federal court had ever so held. However, review in this Court was not sought in *Trafalgar.*

The 2-to-1 decision below is now the second time in which federal circuit judges have divided on the proper construction of *Prima Paint.*

The majority below mistakenly thought that the defense of laches was comparable to the defense of fraud in the inducement of the entire contract which this Court held is for the arbitrators, rather than to the defense of fraud in the inducement of the arbitration clause itself, which is for the court (14a).

The questions of laches and estoppel presented here are not directed to the entire contract. To the contrary, these defenses put in issue only the arbitration clause. They raise the question of whether respondent continues to have a right to take advantage of the arbitration clause when, by its delay in invoking arbitration and its misleading representations as to the existence of arbitrable claims, it deprived petitioner of its reciprocal rights under the same arbitration clause to a fair and timely arbitration. Respondent's misconduct which forms the basis of the defense here is misconduct in the utilization of the arbitration clause—its delay in invoking the clause and its representation that claims requiring arbitration did not exist, which permitted it to dispose of the very plant whose

performance is to be the subject of the arbitration. Similarly, the inequity to petitioner is the injury to its rights under the arbitration clause—both as to a fair opportunity to defend itself and to take timely advantage of the arbitration clause to present claims it could have advanced had it known of respondent's position earlier. There is no rational distinction between such defenses as laches and estoppel, and the defense of fraud in the inducement of the arbitration clause—which, under *Prima Paint*, is for the court.

Review by this Court is thus necessary to cure the conflict between *Prima Paint* and the divided decisions of the Seventh and Second Circuits, to clarify *Prima Paint* which has already led to two 2-1 Circuit Court decisions, with the Chief Judges of two Circuits dissenting, and to prevent what we believe to be a misreading of the *Prima Paint* opinion in the future.

II. The decision below creates an irrational distinction between commercial and labor arbitration cases.

Only five months prior to its decision here, the Court below held in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 440 F.2d 557 (7th Cir. 1971),* that in an action to enforce a labor arbitration contract the defense of laches was for the court rather than the arbitrators. In his dissent in this case, Chief Judge Swygert, the author of *Flair*, concluded that the instant case was indistinguishable from *Flair* and from the Sixth Circuit's similar decision in *Amalgamated Clothing Workers* v. *Iron-*

* Rehearing denied April 12, 1971.

all Factories Co., 386 F.2d 586 (6th Cir. 1967), relied on in *Flair.*

The majority below purported to distinguish *Flair* and *Ironall* on the ground that those cases arose under Section 301 of the Labor Management Relations Act (29 U.S.C. §185). Chief Judge Swygert dismissed this distinction, stating (17a):

> "The fact that both *Flair* and *Ironall* arose under section 301 of the Labor-Management Relations Act and the instant suit is brought under the Arbitration Act is of no significance. The underlying principles defining the respective spheres of jurisdiction between courts and arbitrators are the same. Indeed, many of the cases cited as authority for the result in *Ironall* were cases which had arisen under the Arbitration Act."

In fact, the sphere of jurisdiction of the arbitrators in labor cases is traditionally broader than the sphere of the commercial arbitrator. *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960). The majority below has here turned this relationship topsy-turvy by concluding that an issue to be decided by the court in an action to enforce a labor arbitration contract must be decided by the arbitrators where the arbitration contract is commercial.

The majority below sought to account for its distinction on the ground that the language of the Federal Arbitration Act and Section 301 differed. But this difference in language is without significance. For, under Section 301, this Court has imposed the same—if not stronger—limitations on a court's jurisdiction in an action to compel arbitration. *Steelworkers* v. *Warrior & Gulf, supra,* 363 U.S. at

582. Accordingly, if the court's traditional equity power to consider laches overrides the compelling national labor policy favoring arbitration, it follows *a fortiori* that the issue is also for the court where a commercial arbitration contract is involved.

Since there can be no rational distinction made on the basis of whether the arbitration clause is in a commercial or labor contract, the decision below is in conflict with *Flair* and *Ironall.* In *Flair,* the Seventh Circuit held that laches is for the court because it involved "extrinsic" untimeliness (440 F.2d at 560):

> "in that it does not raise any question of whether prescribed procedures for the resolution of disputes have been satisfied but rather requires the determination of *whether delay in the mere notification of the existence of a dispute has prejudiced the ability of the employer to respond without regard to whether procedural prerequisites to arbitration have been followed.*" (Emphasis added)

The same distinction was the basis for the Sixth Circuit's decision in *Amalgamated Clothing Workers* v. *Ironall Factories Co.,* 386 F.2d 586 (6th Cir. 1967), where the Court concluded that laches is for the court because it is

> "independent of any procedure established by the collective bargaining agreement." 386 F.2d at 591-92.

Here, as in *Flair* and *Ironall,* petitioner does not base its defense of laches on any failure to comply with a prescribed procedure of the agreement, but on the general equity principle that respondent's conduct so prejudiced petitioner's ability to defend itself and to invoke the arbitration clause

for its own claims, that it would be inequitable to enforce the arbitration clause at respondents' request.*

The majority was mistaken in its belief that here a "fact-finding review of the entire contract and all of the transactions occurring under it" would be involved before the issue of laches could be determined (14a). As noted in *Flair* and *Ironall,* laches "in no way involves the consideration of the merits of the underlying substantive issue" (440 F.2d at 560). The delay, the absence of excuse, and the loss of the plant whose operations are the subject of arbitration, were not disputed, and are factually unrelated to the contract. Petitioner seeks no adjudication of *any* contractual dispute: Its claim is that it has been so prejudiced in its defense that enforcing arbitration to consider such disputes is inequitable.

In *Flair,* the Seventh Circuit assigned to the District Court the

> "determination of whether delay in the mere notification of the existence of a dispute had prejudiced the ability of any employer to respond [in arbitration]." 440 F.2d at 560.

In *Ironall,* the Sixth Circuit concluded that it was appropriate for the court to decide whether (386 F.2d at 592):

> "Failure to give notice and request arbitration until such a late date would present serious impediments to the [employer] in making an effective defense."

* The majority below mistakenly believed that the interpretation of a "waiver" provision of the contract involved here might be put in issue. Notably, respondent never made this argument, for good reasons. For petitioner does not rest on waiver, but the quite different equitable doctrine of laches and estoppel—silence, delay and affirmative representations resulting in *prejudice* to petitioner's ability to defend itself.

Petitioner presented an identical question to the District Court here. Its refusal to pass upon that question was sustained on the basis of a distinction between labor and commercial arbitration which can not be rationally maintained.

Review by this Court is required to undo the anomalous distinction which the Court below has created between commercial and labor arbitration contracts.

III. The construction given by the Court below to the Federal Arbitration Act will have an adverse and unfair impact on parties to all existing arbitration contracts subject to the Act.

If the construction of the Federal Arbitration Act given by the Court below is permitted to stand, it means that a party to an arbitration agreement can be compelled to proceed to arbitration on any claim no matter how stale, no matter how inexcusably or unconscionably its assertion has been delayed, and no matter how prejudicial the delay has been to its defense. Indeed, under the decision below, a Federal court has no choice but to compel arbitration even if the party demanding arbitration waits 100 years to disclose his claims and demand arbitration. In this very case, the District Court refused even to consider whether there was any inequity in enforcing arbitration at the behest of a party who, under the cover of its delay and misleading representations, was able to destroy the central evidence pertaining to its claim—the very plant whose performance was only later to be disclosed as the subject of arbitration.

Surely review by this Court is desirable before it can be finally concluded that the Federal Arbitration Act was intended to entail such consequences.

In agreeing to arbitrate, each party effectively surrenders its rights to formal rules of evidence, traditional procedural safeguards, and most importantly, to judicial review. But it is unreasonable to assume that in surrendering such vital rights a party agrees to participate in arbitration even though the other party by its delay or misrepresentations causes the destruction or loss of evidence crucial to a defense in the arbitration and deprives the injured party of meaningful access to the benefits of the arbitration clause. It is equally unreasonable to assume that a party agrees to surrender all judicial safeguards against such misconduct and to submit to the unreviewable discretion of the arbitrator the question whether it is equitable to permit the arbitration to proceed at all.

As we have already noted, prior to the 2-to-1 decision below and the 2-to-1 decision of the Second Circuit in *Trafalgar, supra*, it was well settled that such questions were to be decided by the courts. Moreover, the Sixth and Seventh Circuits have held that the question is of such importance that despite the compelling national policy favoring labor arbitration, such questions must be decided by the court before it can enforce a labor arbitration contract. The legislative history of the Federal Arbitration Act makes it clear that Congress did not intend to deprive a court of equity of its traditional power to entertain equitable considerations such as laches and estoppel when asked to exercise its equitable power to enforce arbitrations. The Court below, and the Second Circuit, in departing from

these fundamental principles believed they were following the views of this Court in *Prima Paint*. Only review by this Court can correct this view, which we believe to be mistaken.

Conclusion

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

EDWARD N. COSTIKYAN
Attorney for Petitioner
345 Park Avenue
New York, New York 10022

LLOYD W. BOWERS
SIDNEY S. ROSDEITCHER
SELVYN SEIDEL
Of Counsel

September 16, 1971

Appendix A

Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

No. 18669

HALCON INTERNATIONAL, INC.,
Respondent-Appellant,

v.

MONSANTO AUSTRALIA LIMITED,
Petitioner-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois

July 9, 1971

Before SWYGERT, *Chief Judge,* KILEY and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal raises the question of whether the federal court or the arbitrator shall determine the merits of the defense of laches under the Federal Arbitration Act. 9 U.S.C. §§1-14.

Appendix A

On May 7, 1962, Monsanto Australia Limited, then named Monsanto Chemicals (Australia) Limited ("Monsanto"), a corporation organized under the laws of the Commonwealth of Australia with its principal office in Melbourne, and Halcon International, Inc., then named Scientific Design Company, Inc. ("Halcon"), a corporation organized under the laws of Delaware with its principal office in New York City, entered into an agreement for the design and engineering of a plant to be constructed in Australia for the manufacture of phenol under a process developed by Halcon.

Halcon guaranteed that when completed the plant would be "capable of producing phenol conforming to specifications set forth in Annex B-I at an average rate of at least 2,275 pounds per hour when based on an operating year of 7,920 hours, and with a yield of at least 95.5 pounds of specification phenol for each 100 pounds of benzene contained in the feedstock consumed."

The plant began operating on November 15, 1964. Halcon has conceded that the plant's "performance fell short of the standards set by the agreement."

In September, 1965, Monsanto took control of the operations of the plant, but Halcon's personnel remained at the plant until May, 1967.

On June 1, 1966, representatives of Monsanto and Halcon met. This meeting resulted in alternative written suggestions by Halcon to Monsanto dated July 21, 1966, which would have required additional expenditures by Monsanto of $600,000 followed by either another $850,000 or $1.9 million. No representation was made by Halcon that after Monsanto made these expenditures the guaranteed yield would be satisfied; in fact, one of Halcon's officers conceded that it would not.

Appendix A

Discussions between representatives of Monsanto and Halcon continued through November, 1966. On December 22, 1966, Monsanto advised Halcon that it had considered Halcon's recommendations, had "determined not to spend the added capital via this process" and stated that "for Monsanto the books are now closed."

On July 11, 1967, Monsanto advised Halcon of its intent to "cannibalise the various bits and pieces of the plant" and sought assurance from Halcon that "none of the plant is protected by patents" or otherwise. The plant was shut down in July, 1968, without the guarantee ever having been satisfied.

In November, 1968, a Monsanto representative sought a meeting with a Halcon representative with respect to the plant. A meeting was held on January 9, 1969, at which time Monsanto's claims for damages as a result of Halcon's failure to meet the guarantee in the agreement were discussed. A detailed breakdown of the dollar amount of the claims was furnished on April 22, 1969, by Monsanto to Halcon "to facilitate discussions."

A written demand for arbitration of the claims in accordance with the arbitration clause of the May 7, 1962, agreement was made by letter from Monsanto to Halcon dated December 9, 1969. Halcon filed an action against Monsanto in the Delaware Court of Chancery on December 15, 1969, seeking to enjoin Monsanto from proceeding to arbitration. On December 19, 1969, Monsanto filed its petition in the district court seeking an order directing Halcon to proceed to arbitration and staying the proceedings in Delaware. Halcon filed its answer to the petition, including an affirmative defense based on laches, and Monsanto moved for immediate relief; both parties submitted affidavits in support of their respective positions.

Appendix A

The district court found that it had jurisdiction over the subject matter and parties and entered an order directing Halcon to proceed to arbitration and staying the proceedings in the Court of Chancery in Delaware. The district court disposed of the laches defense by holding that the merits of that defense were to be determined by the arbitrators and not by the court. The district court concluded, "The parties agreed to submit all controversies to arbitration; had they intended to preclude arbitration of the issue of laches they could have expressly so provided in their contract. Moreover, by leaving the matter of laches to the arbitrators the purposes of the Arbitration Act, avoiding the expense and delay of pre-arbitration court proceedings, are fulfilled."

The agreement between the parties dated May 7, 1962, stated that it and certain exhibits attached to it "constitute the full understanding between the parties hereto with reference to the subject matter hereof * * * and neither party shall claim any amendment, modification or release from any provision hereof * * * unless such agreement is in writing signed by the other party and specifically states that it is an amendment to this Agreement."

The agreement further provided:

> The failure of a party hereto at any time to exercise any of its rights or options under this Agreement, save rights and options *specifically limited as to date of exercise thereof,* shall not be, or be construed to be, a waiver of such rights or options or prevent such party from subsequently asserting or exercising such rights or options (emphasis added).

The language of the agreement "in the event the guarantee * * * has not been fulfilled or discharged," provided for Monsanto to elect certain options "at any time" after

the first anniversary of the start-up of the plant, followed by meetings of the parties "to determine a course of action to be followed."

The agreement also included a broad arbitration clause, which read in part:

> All claims, disputes, questions and controversies (other than claims of breach of secrecy obligations) that shall arise under or in connection with this Agreement which cannot be resolved between the parties shall be submitted to and be determined by a board of three arbitrators. Any such arbitration shall be conducted at Chicago, Illinois. * * *
>
> The board so constituted shall conduct the arbitration pursuant to the Commercial Arbitration Rules then in effect of the American Arbitration Association. * * *
>
> This agreement to arbitrate shall be specifically enforceable under the prevailing law with respect to enforcement of arbitration awards. * * *

Halcon contends that Monsanto was obliged to demand arbitration in December, 1966, and that its failure to do so has impaired Halcon's ability to defend against Monsanto's claims: one witness has since left Halcon's employ and now resides in Australia; Halcon has no witnesses for the period after May, 1967, when its employees left the plant site; and "it cannot give a concrete demonstration of the feasibility of its proposal for plant improvement through performance tests and inspection of the plant operations" since the plant is shut down and dismantled.

The answer to the question of whether the merits of the defense of laches as raised in the circumstances of this case

are to be determined by the arbitrators or by the court depends in the first instance upon a reading of the statute.

Section 2 of the Arbitration Act of 1925 provides in part, "A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * *shall be* valid, irrevocable, and *enforceable, save upon such grounds as exist* at law or in equity *for the revocation of any contract*" (emphasis added).

Section 4 provides in part:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

In this case there is no dispute as to the "making" of the agreement which included the arbitration clause or as to the failure of Halcon to comply with the clause. But Halcon contends that "making" includes "unmaking" and that laches "unmakes" the agreement to arbitrate.

The doctrine of laches, like statutes of limitations, merely bars the remedy but does not discharge the right. 6 Williston, Contracts §2002, page 5628 (Rev. Ed., 1938); *Campbell* v. *Holt,* 115 U.S. 620 (1885). It is a shield of equitable defense rather than a sword for the investiture or divestiture of legal title or right. 27 Am. Jur. 2d, Equity §152, 30A C.J.S., Equity §113. When laches are applied, the contract becomes unenforceable but not invalid. *Cf.* Restatement of Contracts, §86. Thus the Restatement of Contracts distinguishes between voidable contracts (such as those induced by fraud, mistake or duress) and unen-

forceable contracts (such as those where enforcement is barred because of a statute of limitations, discharge in bankruptcy or statute of frauds). Restatement of Contracts, §§13, 14. Assuming that the positive "making" of Section 4 infers the negative "unmaking," such "unmaking" would appear to be limited to invalidation rather than to rendering unenforceable.

In considering the meaning of the word "making" in Section 4, note must also be taken of the meaning of "revocation" in Section 2. The word "revocation," when used in a contractual context, ordinarily refers to revocation of an offer or an option; but it is used in Section 2 of the Arbitration Act to apply to a contract and in that connotation obviously is intended to be synonymous with "rescission." Rescission is an appropriate remedy when, for example, a contract is induced by fraud, mistake or duress, and is "used chiefly where the termination of the contractual relation is by mutual consent." 5 Williston, Contracts §1454A, page 4063 (Rev. Ed., 1937). "Revocation" and "cancellation" are closely synonymous; to revoke means "to annul, repeal, rescind, cancel." *Gleeram Wine & Liquor Corp.* v. *O'Connell,* 295 N.Y. 336, 67 N.E. 2d 570 (1946).

Since the savings clause of Section 2 is limited to "revocation," this is clearly the only type of "unmaking" contemplated by the act—that is, an unmaking resulting from the mutual cancellation of the contract by the parties or the voiding of the transaction due to fraud, mistake or duress. Such a construction does not encompass the unenforceability of a contract due to laches.

Therefore Section 4 alone or together with Section 2 gives the federal courts no jurisdiction under the Arbitration Act, when presented with an agreement to arbitrate which has not been revoked, to do other than to "make an order directing the parties to proceed to arbitration." The

defense of laches then becomes a matter for the determination of the arbitrators.

This plain construction of the statute is supported by the preponderant weight of the public policy arguments inherent in the recognition of arbitration and by the weight of judicial authority construing the United States Arbitration Act.

At the outset, a distinction should be made between arbitration provisions in collective bargaining agreements enforceable under §301 of the Labor Management Relations Act (29 U.S.C. §185), which does not contain the limiting language of Sections 2 and 4 of the Arbitration Act, and commercial arbitration in accordance with the latter act. The Supreme Court pointed out in *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960), that "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement," such as the agreement involved here.

In a commercial arbitration case, *Galt* v. *Libby-Owens-Ford Glass Co.*, 376 F. 2d 711 (7th Cir. 1967), this court has set forth some of the policy considerations which govern at page 714:

> Under the Federal Arbitration Act, the courts have been assigned the limited role of "ascertaining whether the party seeking arbitration is making a claim which on its face is one governed by the agreement." * * * The policy of the Federal Arbitration Act is to promote arbitration to accord with the intention of the parties and to ease court congestion. * * * All doubts are to be resolved in favor of arbitration. * * * Whenever possible, the courts will use the Federal Arbitration Act to enforce agreements to arbitrate. * * *

Appendix A

In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Supreme Court considered a "broad" arbitration clause in a commercial contract, as here, and considerably narrowed the role of the court *vis-a-vis* the arbitrator. Whereas a reading of the statute might warrant the conclusion that fraud of any kind could be considered by the court as a "revocation" of a contract, in *Prima Paint* the Court held at pages 403-4 (footnote omitted):

> Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

The Court found that the language that "any controversy or claim arising out of or relating to this Agreement, or the breach thereof" be arbitrable was broad enough to encompass defenses that both execution and acceleration of the agreement were procured by fraud. See also *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2nd Cir. 1959), *cert. granted*, 362 U.S. 909, *dismissed under Rule 60*, 364 U.S. 801 (1960).

In *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F. 2d 568 (2nd Cir. 1968), Trafalgar demanded arbitration under a commercial agreement in August, 1966, of claims relating to damages to a vessel occurring in early 1961. International defended on the ground that Trafalgar's right to arbitrate was barred by laches. In support thereof, it submitted affidavits showing that Trafalgar's long delay in asserting its claim had left International powerless to defend itself before the arbitrators, owing to the death or disappearance of witnesses to the grounding, the

loss of evidence to show the cause of damages to the vessel and other difficulties. The court of appeals concluded that, "In our view, all of these approaches [the purpose of the laches doctrine, the objectives of the federal Arbitration Act and prior Second Circuit cases] lead to the conclusion that the issue of laches as it presents itself in this case is one for the arbitrators to decide."[1] 401 F.2d at 571.

The court further noted:[2]

> Moreover, in our view, laches is not a technical legal issue which only a judge is competent to decide. Rather, in the often esoteric field of commercial dealings, and in admiralty, it would seem that the severity of prejudice suffered through delay, and the reason-

1. The court added that "if a party were to assert that the agreement for arbitration was procured through fraud or duress, raising a question as to its 'making,' * * * the court might then consider whether evidence essential to the proof of this defense had, owing to the unexcused delay of the moving party, become unavailable. * * *" 401 F.2d at 571-72.

2. In a dissenting opinion in *Prima Paint*, Mr. Justice Black, arguing that fraud in the inducement is better resolved by courts, speculated that arbitrators "in all probability will be nonlawyers" and "their compensation corresponds to the volume of arbitration they perform." 388 U.S. at 407 and 416. Chief Judge Lumbard dissented in *Trafalgar* and voiced a similar opinion: "Once [the arbitrators] have bitten into the enticing fruit of controversy, they are not apt to stay the satisfying of their appetite after one bite." 401 F. 2d at 573-74. In Coulson, *Prima Paint: An Arbitration Milestone*, 23 Bus. Law. 241, 246 (1967), it is noted: "In many modern arbitration tribunals, all or most of the arbitrators are lawyers. And it is certainly not true that commercial arbitrators depend for their compensation upon 'the volume of arbitration they perform.' Under AAA administration, arbitrators generally volunteer their services except in cases that involve several hearings, or where the parties mutually agree to compensate them; and even then the compensation is generally nominal. In less than 10% of the non-labor cases administered by the AAA are the arbitrators compensated. Thus, it is unlikely that a commercial arbitrator will be motivated to assert jurisdiction for personal reasons."

ableness of excuses offered by the dilatory party, the elements of laches, might be resolved better where resort is had to the expertise of the arbitrator. 401 F.2d at 572.

Halcon contends that the court should rule on laches, inasmuch as dilatory conduct amounting to "waiver" of the arbitration agreement is a "default in proceeding with such arbitration" within the meaning of Section 3 of the Arbitration Act. *Cornell & Company* v. *Barber & Ross Co.*, 360 F.2d 512 (D.C. Cir. 1966). In that case, "the litigation machinery had been substantially invoked and the parties were well into the preparation of a lawsuit" when, some four months after the complaint was filed, the demand for arbitration was first made. In the present case, the arbitration demand was made prior to Monsanto's seeking to stay the Delaware judicial proceedings and no "waiver" of the kind involved in *Cornell* occurred. It is settled that delay in making an arbitration demand is not a default within the meaning of Section 3. *Almacenes Fernandez, S.A.* v. *Golodetz,* 148 F. 2d 625, 627-28 (2nd Cir. 1945); *Hilti, Inc.* v. *Oldach,* 392 F. 2d 368, 372, n. 9 (1st Cir. 1968); *Batson Yarn and Fabrics Machinery Group, Inc.* v. *Sauer-Allma GmbH-Allgauer Maschinenbau,* 311 F. Supp. 68, 72-74 (D.S.C. 1970).

Halcon cites two other cases: *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.,* 126 F. 2d 978 (2nd Cir. 1942), where the court found no default under Section 3 by a defendant which had answered in the judicial proceeding and nine months later filed an amended answer setting up an arbitration clause as a separate defense; and *Carcich* v. *Rederi A/B Nordie,* 389 F. 2d 692 (2nd Cir. 1968), where the court also found no waiver despite participation by the party in judicial proceedings and said, "Waiver * * * is not to be lightly inferred." 389 F.2d at 696.

Appendix A

In the Section 3 cases the courts are directed by the statute to stay their own judicial proceedings pending the completion of arbitration "providing the applicant for the stay is not in default in proceeding with such application." Thus Section 3 expressly gives the courts jurisdiction to determine the existence of a default. Monsanto is not guilty of default or waiver by judicial participation under Section 3 in the present case. "Waiver" in the laches or estoppel sense, rather than in the default sense of participating in judicial proceedings, was held to be an issue to be decided by the arbitrators and not by the court in *World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F. 2d 362 (2nd Cir. 1965).[3]

Halcon relies upon *Nortuna Shipping Co.* v. *Isbrandtsen Co.*, 231 F. 2d 528 (2nd Cir.), *cert. denied*, 351 U.S. 964 (1956) (no indication that issue of whether laches should be determined by arbitrators was raised); *Reconstruction Finance Corp.* v. *Harrisons & Crosfield, Ltd.*, 204 F. 2d 366 (2nd Cir.), *cert. denied*, 346 U.S. 854 (1953) (distinguished in *Trafalgar*); and *In re Sociedad Armadora Aristomenis Panama*, 244 F.Supp. 653 (S.D.N.Y. 1965) (overruled in *Trafalgar*). These cases are no longer good authority in view of the Second Circuit's most recent ruling that the question of laches is for the arbitrators and not for the court in *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F. 2d 568 (2d Cir. 1968).

Up to this point we have limited our discussion to commercial arbitration cases. However, Halcon has also relied upon three labor arbitration cases: *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F.2d 586 (6th Cir. 1967); *ITT World Communications, Inc.* v. *Communications Workers*, 422 F.2d 77 (2nd Cir. 1970); and *Interna-*

3. Laches as well as waiver was involved in *World Brilliance*, but the court said, "Because neither party argues that the issue of laches should have been left to the arbitrators, we find it unnecessary to examine the authorities on this question." 342 F.2d at 365, n. 1.

tional Union of Operating Engineers v. *Flair Builders, Inc.*, —— F. 2d —— (7th Cir., No. 18334, Feb. 5, 1971).

The *ITT* case raises the same question as the commercial arbitration cases raised under Section 3 of the Arbitration Act: whether participation in judicial proceedings waives the right to arbitrate. In *ITT* the court held that waiver was not established.

Our decision in *Flair Builders,* which relied to some extent upon *Ironall,* demonstrates the difficulty in attempting to apply labor arbitration cases to commercial cases governed by the specific language of a particular statute. In *Flair Builders,* the majority of the court affirmed the district court's finding "that there had been no contact whatsoever between the union and Flair from the date of the signing of the memorandum of agreement in 1964 until the summer of 1968," while the arbitration clause was incorporated in a 1966 master agreement between the union and a contractor association. Had *Flair Builders* been a commercial rather than a labor case, the court could have reached its decision simply by applying Section 4 of the Arbitration Act and finding that "the making of the agreement for arbitration" was in issue.

But aside from the fact that both *Ironall* and *Flair Builders* arose under Section 301 of the Labor Relations Management Act (29 U.S.C. §185), which does not contain the restrictive language relating to court jurisdiction found in Sections 2 and 4 of the Arbitration Act, they are both readily distinguishable. In *Ironall,* the court emphasized that its decision did not involve interpreting the collective bargaining agreement. In *Flair Builders,* we decided that *extrinsic* untimeliness, separate and apart from the principal contract, may be determined by the court. But we pointed out that *intrinsic* untimeliness—that is, untimeli-

ness intrinsic to the entire contract and its interpretation—"must be determined by the arbitrator."

In this case, the question of timeliness or untimeliness involves the whole contract and its interpretation. As in *Prima Paint,* the written agreement here constituted the full understanding between the parties and the arbitration clause was as broad as words could make it. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.,* 388 U.S. 395, 397-98 (1967).

The agreement also had a waiver clause which expressly provided that "the failure of a party hereto at any time to exercise any of its rights or options * * * save rights and options specifically limited as to date of exercise thereof, shall not be, or be construed to be, a waiver. * * *" It further provided that if the guarantee was not fulfilled, the parties would meet *"at any time"* after the first anniversary of the start-up of the plant "to determine a course of action to be followed."

As in *Prima Paint,* the entire contract, and not merely the arbitration clause, is in issue. The question of laches is intrinsic to the whole contract. Whether there was any inexcusable, unreasonable and prejudicial delay requires a fact-finding review of the entire contract and of all of the transactions occurring under it. It must be determined how the question of timeliness was affected by the conceded failure to meet the guarantee, by the efforts of the parties to solve the resulting problems, by the period of discussions between the parties, by the closing of the plant, by the changing conditions and circumstances, by the importance of the knowledge of the witness who moved to Australia, and by a host of other problems requiring a certain amount of expertise by the factfinders.

In view of all these considerations, we conclude that under the circumstances of this case the issue of laches

is to be determined by the arbitrators. We affirm the order of the district court directing Halcon to proceed to arbitration and staying the proceedings in the Court of Chancery in and for New Castle County, Delaware.

AFFIRMED.

SWYGERT, *Chief Judge,* dissenting.

I respectfully dissent. Section 4 of the Federal Arbitration Act, if read alone, would confine the issues in an action seeking to enforce an arbitration agreement to (1) whether the agreement was made and (2) whether there has been a failure to perform it; however, that section must be read with section 2 of the Act which provides that commercial arbitration agreements "shall be valid, irrevocable and enforceable, *save upon such grounds as exist at law or in equity for revocation of any contract.*" (Emphasis added.)

I would not confine the meaning of the word "revocation" in section 2 to the narrow limits suggested by Judge Sprecher. In the context of the savings clause, I think the word encompasses not only rescission of an arbitration agreement induced by fraud, mistake or duress, but also its termination or "unmaking" on equitable grounds of laches, estoppel or waiver.

In construing the Federal Arbitration Act, the Supreme Court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), ruled that, despite the limitation of issues placed on a court by section 4 of the Act, the issue of whether an arbitration agreement has been induced by fraud is for the court to decide, as a preliminary matter, rather than for the arbitrator. If the issue of fraud in the inducement of the agreement must be decided by a court as a threshold issue in an enforcement proceeding under sec-

tion 4, similar reasons require that laches as a preliminary issue must be decided by the court. Laches like fraud constitutes a defense to the invocation of an agreement to arbitrate.[1] It appears anomalous to me to hold in one instance that the court may preliminarily inquire as to whether fraud induced the agreement and in the other that the arbitrator rather than the court must decide whether laches bars the very proceeding the court has ordered. To compound the anomaly, if the arbitrator determines that it would be inequitable to proceed because of the delay by one party in demanding arbitration and the resultant prejudice to the other party, the court in ordering arbitration would have in effect enforced unenforceable obligations on the parties.[2]

Furthermore, with all deference to the views of the majority, I am unable to distinguish in principle the instant case from our recent decision in *International Union of Operating Engineers, Local 150, AFL-CIO* v. *Flair Builders, Inc.*, —— F.2d —— (7th Cir. No. 18334, Feb. 5, 1971). There we held that the district court properly entertained

1. Fraud in the inducement does not render a contract void, but rather renders it avoidable and subject to ratification. 1 A. CORBIN, CONTRACTS §6 at 12-13 and §146 at 636 (1963). Fraud in the inducement thus does not nullify the making of the contract, but may render the contract unenforceable by a party because of his own conduct. By the same token, laches raised as a defense does not nullify the obligations of a contract, but may render them unenforceable by a party because of his own conduct.

2. As the Supreme Court noted in *Prima Paint*:

> [T]he purpose of Congress [in enacting the Act] was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the "savings clause" [of section 2 of the Act]. 388 U.S. at 404 n. 12.

That reasoning applies with equal force where laches is the issue.

the question of laches raised as a defense to a demand to arbitrate pursuant to a collective bargaining contract. We relied for support on the Sixth Circuit's decision in *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F.2d 586 (6th Cir. 1967), another labor arbitration case. The fact that both *Flair* and *Ironall* arose under section 301 of the Labor-Management Relations Act and the instant suit is brought under the Arbitration Act is of no significance. The underlying principles defining the respective spheres of jurisdiction between courts and arbitrators are the same. Indeed, many of the cases cited as authority for the result in *Ironall* were cases which had arisen under the Arbitration Act.

I would reverse.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix B

Memorandum of Decision

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 69 C 2630

IN THE MATTER OF THE ARBITRATION BETWEEN
MONSANTO AUSTRALIA LIMITED, a corporation,
Petitioner,

vs.

HALCON INTERNATIONAL, INC., a corporation,
Respondent.

This cause came on to be heard on the petition of Monsanto Australia Limited, a corporation organized and operating under the laws of Australia, having its principal place of business in Melbourne, Australia, for an order pursuant to Sections 3 and 4 of the United States Arbitration Act, 9 U.S.C. §§ 3, 4, directing Halcon International, Inc., a corporation organized and operating under the laws of the State of Delaware, having its principal place of business in New York City, to proceed to arbitration of controversies that have arisen between them relating to an agreement between the parties dated May 7, 1962, and for an order staying permanently further proceedings between the respondent as plaintiff and the petitioner as defendant in the Court of Chancery in and for New Castle County, Delaware, Civil Action No. 3207, 1969.

Appendix B

Article 16 of the contract entered into by the parties, dated May 7, 1962, provided that "All claims, disputes, questions and controversies * * * that shall arise under or in connection with [the] Agreement which cannot be resolved between the parties shall be submitted to and be determined by a board of three arbitrators." The contract provided that either party could initiate arbitration proceedings by giving written demand for arbitration to the other party. Procedures for the selection of arbitrators and the conduct of the arbitration were set forth, and it was agreed that any such arbitration was to be conducted in Chicago, Illinois.

A dispute within the meaning of Article 16 has arisen between the parties, relating to the petitioner's claim that the respondent's performance failed to fulfill certain guarantees contained in the agreement and that the respondent is therefore liable to the petitioner for consequent losses. The parties have been unable to resolve their differences by negotiation, and on December 9, 1969, the petitioner initiated arbitration proceedings by sending a written demand for arbitration to the respondent. On December 15, 1969, the respondent filed an action in the Court of Chancery for New Castle County, Delaware, seeking to restrain the petitioner from proceeding to arbitration on the ground that the petitioner's claim is barred by the Delaware statute of limitations. On December 19, 1969, the petitioner filed this action to compel arbitration.

The court has jurisdiction over the subject matter of this action and over the parties. See *Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354 (2d Cir. 1964). An action to compel arbitration is authorized by 9 U.S.C. §4, which provides:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

> agreement for arbitration may petition any United States district court * * * for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *"

The respondent resists the petitioner's demand for arbitration on the ground that the petitioner is guilty of laches in that it delayed at least four years before disclosing its claim and is therefore barred from invoking the power of this Court to enforce the arbitration clause.

Under Section 4 the court is instructed to order that arbitration proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue. The Supreme Court, in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), held that the court may consider *only* issues relating to the making and performance of the agreement to arbitrate, and that other issues must be left to the arbitrators. The Court said that this limited role of the court would serve the congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts. 388 U.S. at 404. The preference for arbitration when it has been agreed to by the parties to a contract has also been noted by the Court of Appeals for the Seventh Circuit, which said in *Galt* v. *Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (1967): "The policy of the Federal Arbitration Act is to promote arbitration to accord with the intention of the parties and to ease court congestion. * * * All doubts are to be resolved in favor of arbitration."

Appendix B

It follows from the foregoing that the matter of laches in demanding arbitration is not one for the court to determine. That issue goes neither to whether the agreement to arbitrate was made nor to whether a party has failed or refused to comply with a demand for arbitration. Rather, it goes to whether the petitioner should be allowed to recover from the respondent—the ultimate question which the arbitrators were intended to determine. This conclusion has been reached by the Court of Appeals for the Second Circuit. In *Trafalgar Shipping Co.* v. *International Milling Co.*, 401 F.2d 568 (1968), the court held that the court may consider only those questions of delay which relate to and affect issues which it is called upon to decide in connection with the motion under 9 U.S.C. §4, and that the issue of laches in bringing a demand for arbitration is one for the arbitrators to decide. 401 F.2d at 570-71.

The argument of the respondent that the weight of authority is contrary to the decision in *Trafalgar* is not persuasive. *Reconstruction Finance Corp.* v. *Harrisons & Crossfield,* 204 F.2d 366 (2d Cir. 1953), has been subject to conflicting interpretations. That conflict has been resolved, however, as the Court of Appeals in *Trafalgar* construed *Reconstruction Finance* as leaving the matter of laches to the arbitrators. In *Nortuna Shipping Co.* v. *Isbrandtsen Co.*, 231 F.2d 528 (1956), also cited by the respondent and also decided by the Second Circuit, the precise question of who should determine the question of waiver, an issue somewhat similar to laches, was not raised before the court. See *World Brilliance Corp.* v. *Bethlehem Steel Corp.*, 342 F.2d 362, 365 (2d Cir. 1965). Two other cases relied upon by the respondent are also inapposite. *Boris* v. *Hamilton Manufacturing Co.*, 253 F.2d 528 (7th Cir. 1958), did not involve an agreement to arbitrate disputes. *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F.2d 586 (6th Cir. 1967), did not involve commercial

arbitration governed by 9 U.S.C. §4, but rather involved an action to compel arbitration of a labor dispute under the Labor Management Relations Act, 29 U.S.C. §185. There the court was not limited by the Supreme Court's holding in *Prima Paint* or by the statutory language of Section 4 of the Federal Arbitration Act.

In addition to the available pertinent authority, considerations of public policy also require that the matter of laches be left to the arbitrators. The purpose of the equitable doctrine of laches is to relieve a decision-maker of the duty to resolve issues as to which the relevant evidence has been lost due to the delay of a party. If the petitioner here has been guilty of laches as claimed by the respondent it would be inequitable for it to recover. There is no reason however, why the question of whether the petitioner is guilty of laches should be determined by the court rather than by the arbitrators. The parties agreed to submit all controversies to arbitration; had they intended to preclude arbitration of the issue of laches they could have expressly provided in their contract. Moreover, by leaving the matter of laches to the arbitrators the purposes of the Arbitration Act, avoiding the expense and delay of pre-arbitration court proceedings, are fulfilled. In addition, as the court stated in *Trafalgar*:

> "* * * laches is not a technical legal issue which only a judge is competent to decide. Rather, in the often esoteric field of commercial dealings * * * it would seem that the severity of prejudice suffered through delay, and the reasonableness of excuses offered by the dilatory party, the elements of laches, might be resolved better where resort is had to the expertise of the arbitrators."

401 F.2d at 572.

Appendix B

The motion of the petitioner for an order directing the respondent to proceed to arbitration and staying the proceedings in the Court of Chancery in and for New Castle County, Delaware is allowed. An order will be entered accordingly.

Enter:

Julius J. Hoffman
United States District Judge

Dated: June 29, 1970.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 9, 1971

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

No. 18869

HALCON INTERNATIONAL, INC.,
Respondent-Appellant,

vs.

MONSANTO AUSTRALIA, LTD., a corporation,
Petitioner-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, WITH COSTS.

Appendix D

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Wednesday, August 11, 1971

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

No. 18869

In the Matter of Arbitration Between:

MONSANTO AUSTRALIA, LTD., a corporation
Petitioner-Appellee,

vs.

HALCON INTERNATIONAL, INC.,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

Chief Judge Luther M. Swygert voted to grant the petition for rehearing.

Appendix E

Statutory Provisions Involved

Section 2 of the Federal Arbitration Act, 9 U.S.C. §2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the Federal Arbitration Act, 9 U.S.C. §4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for

arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear the determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Appendix E

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a)

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-388

HALCON INTERNATIONAL, INC.,
Petitioner,

vs.

MONSANTO AUSTRALIA LIMITED,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HARLAN L. HACKBERT,
208 South LaSalle Street,
Chicago, Illinois 60604,
Attorney for Respondent.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

	PAGE
The Issue	1
Argument	3
I. The decision below is in complete accord with the statute and with this Court's opinion in *Prima Paint*	3
II. There is no true conflict between the decision below and *Ironall* and *Flair Builders*	8
III. The decision below has no "adverse impact on parties to all existing arbitration contracts subject to the Act	10
Conclusion	11

TABLE OF AUTHORITIES.

Cases Cited.

Amalgamated Clothing Workers v. Ironall, 6 Cir. (1967), 386 F. 2d 586	8
A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co. (1970), 25 N. Y. 2d 576, 255 N. E. 2d 774, cert. den. June 1, 1970, ... U. S. ....., 90 S. Ct. 1844, 26 L. Ed. 2d 272	5, 7
Bealmer v. Texaco Inc., 9 Cir. (1970), 427 F. 2d 885	9
Chambers v. Beaunit Corp., 6 Cir., 404 F. 2d 128	9
John Wiley & Sons v. Livingston (1964), 376 U. S. 543.	8
Local 148 v. Interco, Inc., 8 Cir. (1969), 415 F. 2d 1208.	9
Local Union No. 51 v. Illinois Power Co., 7 Cir. (1966), 357 F. 2d 916	9

Ocean Industries, Inc. v. Soros Associates (D. C. N. Y.), 328 F. Supp. 944 7

Operating Engineers v. Flair Builders, Inc. (7 Cir., 1971), 440 F. 2d 557 8

Porter Co. v. Local 37, 4 Cir. (1968), 400 F. 2d 691 9

Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967), 388 U. S. 395 ..... 2, 3, 10

Reconstruction Finance Corp. v. Harrison & Crossfield, 2 Cir. (1953), 204 F. 2d 366, cert. den. 346 U. S. 854. 8

Rochester Telephone Co. v. Communication Workers (2 Cir. 1965), 340 F. 2d 237 9

Sears Roebuck & Co. v. Glenwal Co., 325 F. Supp. 86, aff'd 442 F. 2d 1350 7

Trafalgar Shipping Co. v. International Milling Co., 2 Cir. (1968), 401 F. 2d 568 ..... 2, 5, 9, 10

World Brilliance Corp. v. Bethlehem Steel Co., 2 Cir. (1965), 342 F. 2d 362 8

Statute Cited.

9 U. S. C. § 4 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-388

HALCON INTERNATIONAL, INC.,

Petitioner,

vs.

MONSANTO AUSTRALIA LIMITED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE ISSUE.

We submit the appellant has misstated the issue in this case.

The single issue is whether in the statutory action under the Federal Arbitration Act (9 U. S. C. §§ 1 *et seq.*) in which there is no dispute as to the making of the agreement to arbitrate or the failure of the respondent-appellant to comply therewith, the federal court may consider the alleged defense of laches in the initial assertion of the claim in dispute, or whether that issue is for determination by the arbitrators.

We submit the answer is found in the clear and unambiguous language of the statute itself (9 U. S. C. § 4), as construed by this Court in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* (1967), 388 U. S. 395. That case presents no issue of *sub silentio* overrulings of pre-*Prima Paint* cases in the Second Circuit; the Second Circuit itself has distinguished or expressly overruled those earlier opinions in *Trafalgar Shipping Co.* v. *International Milling Co.* (2 Cir., 1968), 401 F. 2d 568, in an opinion which squarely accords with the opinions of both lower courts here. There is no conflict between the holding below and *Prima Paint*, except with Mr. Justice Black's dissenting opinion; a different statute is involved in the labor arbitration cases; and the holding below follows the plain meaning of the Arbitration Act and the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

ARGUMENT.

I.

THE DECISION BELOW IS IN COMPLETE ACCORD WITH THE STATUTE AND WITH THIS COURT'S OPINION IN PRIMA PAINT.

The statute here involved is 9 U. S. C. § 4 which so far as relevant provides:

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.* (1967), 388 U. S. 395, at 402, this Court defined "the central issue in this case", one upon which courts of appeal had differed as:

> "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."

This Court readily found the answer in the statute, saying (pp. 403-4):

> "With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration

> agreement. Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

This construction of the statute does not "render arbitration agreements more enforceable than other agreements"; it simply delineates which tribunal shall decide which issues.

Petitioner's interpretation of *Prima Paint* is that of the thesis of Mr. Justice Black's *dissenting* opinion in *Prima Paint*, 388 U. S. 407 *et seq.* The majority of the Court found Mr. Justice Black's review of the legislative history (*ibid.*, pp. 412-23) unpersuasive. The majority of the Court correctly read the "savings clause" in § 2 of the Act as limiting the court's consideration of equitable defenses to those

justifying revocation of the arbitration provision, not revocation of the entire contract. 388 U. S. 404, n. 12; cf. the dissent, *ibid.*, pp. 416-22.

Petitioner's construction of *Prima Paint* was rejected by the Court of Appeals for the Second Circuit in *Trafalgar Shipping Co.* v. *International Milling Co.* (1968), 2 Cir., 401 F. 2d 568 and is conclusively refuted by this Court's denial of certiorari to review the decision of the New York Court of Appeals in *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.* (1970), 25 N. Y. 2d 576, 255 N. E. 2d 774, *cert. den.* June 1, 1970, ... U. S. ....., 90 S. Ct. 1844, 26 L. Ed. 2d 272.

In *Trafalgar*, the petitioner's vessel was damaged on February 24, 1961. In November, 1965 Trafalgar notified International of its claim. In August, 1966, Trafalgar demanded arbitration. The Court said (p. 570):

> "In August, 1966, Trafalgar demanded that the dispute be submitted to arbitration; it gave notice of its selection of an arbitrator and requested International to appoint one in accordance with the arbitration agreement but International refused.
>
> "In May, 1967, Trafalgar brought this suit in the district court to compel arbitration, 9 U. S. C. § 4. International defended the action on the ground that Trafalgar's right to arbitrate was barred by laches. In support of this it submitted affidavits which purported to show that Trafalgar's long delay in asserting its claim had left International powerless to defend itself before the arbitrators, owing to the death or disappearance of witnesses to the grounding, the loss of evidence to show the cause of the damage to the vessel, and other difficulties."

Thus, the court was (p. 571):

> "directly confronted with the question whether laches is for the court or the arbitrators",

the identical question now before this court and the court answered, saying (p. 57):

> "In answering it we consider the opinion in *Reconstruction Finance*, the purpose of the laches doctrine, and the objectives of the federal Arbitration Act, 9 U. S. C. §§ 1-13. *In our view, all of these approaches lead to the conclusion that the issue of laches as it presents itself in this case is for the arbitrators to decide.*" (Emphasis supplied.)

The court then considered "the purpose of laches," saying (p. 571):

> "The purpose of laches is simply to relieve a decision-making body of the duty to resolve, and to prevent one party from having to prove, issues as to which the relevant evidence has been lost due to the delay of the other party. The only issues which the court is authorized to consider on a motion to compel arbitration are ones which pertain to 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same,' 9 U. S. C. § 4; Prima Paint Corp. v. Flood & Conklin, *supra*, 388 U. S. at 403-404, 87 S. Ct. 1801. If one of these issues is disputed before the court, and if one party claims that its ability to present proof in relation thereto has been prejudiced through the delay of the other, the court may consider whether it is fair to permit the dilatory party even to invoke its processes under the Act."

The court concluded (p. 572):

> "Because in the present case, none of the issues which we have mentioned is in dispute, there is no question of laches which the court should decide.
>
> "We hold that on a motion to compel arbitration a district court may consider only claims of laches which relate to issues which the court must decide. The arbitrators must resolve any such claims which relate to issues which the parties have agreed to submit to arbitration."

That the Second Circuit fully recognizes the import of *Prima Paint* is seen in its affirmative, *per curiam,* upon oral argument, in *Sears Roebuck & Co.* v. *Glenwal Co.* (2 Cir., 1971), 442 F. 2d 1350 upon the opinion below, 325 F. Supp. 86 which held (p. 90):

> "It is beyond question that the parties agreed to submit disputes arising under the construction contract to arbitration, and since no claim is made, nor could any be advanced upon the facts here asserted, that the arbitration clause was induced by fraud, the matter must go to arbitration." (citing *Prima Paint*)

See also, *Ocean Industries Inc.* v. *Soros Associates* (D. C., N. Y.) 328 F. Supp. 944.

In *Dow Chemical,* the New York court construed *Prima Paint* as holding that under the Federal Arbitration Act (255 N. E. 2d at 776):

> "under that statute, once the arbitration clause itself is found to be valid, all questions, including that having to do with a time limitation, must be left to the arbitrators for ultimate decision."

Holding the federal act applicable, since the charter party was a maritime contract, the court held the petitioner could not invoke the New York rule that the issue of time limitations was for the court, nor bring an action in the state court to avoid arbitration. This Court denied certiorari. 90 S. Ct. 1844, 26 L. Ed. 2d 272. Since the issue was clear-cut, this Court's ruling is squarely *contra* to Petitioner's interpretation of *Prima Paint.*

II.

THERE IS NO TRUE CONFLICT BETWEEN THE DECISION BELOW AND IRONALL AND FLAIR BUILDERS.

In its briefs below, petitioner here relied upon *Amalgamated Clothing Workers* v. *Ironall Factories Co.* (6 Cir., 1967), 386 F. 2d 586, and upon the oral argument cited the recent decision of the court below in *Operating Engineers* v. *Flair Builders, Inc.* (7 Cir., 1971), 440 F. 2d 557. In its petition here, petitioner asserts (p. 3) that the decision below creates "an irreconcilable conflict with the unanimous federal circuit court decisions" in labor arbitration cases. We submit there is no such conflict.

In the first place, both *Ironall* and *Flair Builders* were actions brought under § 301 of the Labor Management Relations Act (29 U. S. C. § 185), which contains no limitations upon the issues which the district court may consider, such as are contained in § 2 and § 4 of the United States Arbitration Act (9 U. S. C. §§ 2, 4). Neither opinion refers in any way to the Arbitration Act, or considers *Prima Paint. Ironall* obviously misinterprets *Reconstruction Finance Corp.* v. *Harrison & Crossfield* (2 Cir., 1953) 204 F. 2d 366 and *World Brilliance Corp.* v. *Bethlehem Steel Co.* (2d Cir., 1965), 342 F. 2d 362 as those cases were later read by the court in *Trafalgar. Flair Builders* considers none of the commercial arbitration cases. No "irreconcilable conflict" is presented by these decisions.

Secondly, *Ironall* and *Flair Builders* do not stand for any body of "unanimous federal circuit court decisions in actions to enforce labor arbitration contracts that the issue of laches is for the court"(Pet., p. 3) Both of these cases are in conflict with this Court's holding in *John Wiley & Sons* v. *Livingston* (1964), 376 U. S. 543 that that issue should be for the arbitrator, not the court. *Ironall* is in

conflict with the Sixth Circuit's later decision in *Chambers* v. *Beaunit Corp.* (6 Cir., 1968), 404 F. 2d 128, *Flair Builders* with the earlier decision of the Seventh Circuit, *en banc,* in *Local Union* v. *Illinois Power Co.* (7 Cir., 1966), 357 F. 2d 916; both are in conflict with the Second Court's decision in *Rochester Telephone Co.* v. *Communications Workers,* 2 Cir. (1965), 340 F. 2d 237, the Fourth Circuit's decision in *Porter Co.* v. *Local 37,* 4 Cir. (1968), 400 F. 2d 691, the Eighth Circuit's decision in *Local 148* v. *Interco, Inc.,* 3 Cir. (1969), 415 F. 2d 1208, and the Ninth Circuit's decision in *Bealmer* v. *Texaco Inc.,* 9 Cir. (1970), 427 F. 2d 885.

Finally, if we accept Chief Judge Swygert's distinction between *extrinsic* and *intrinsic* untimeliness as did Judge Sprecher below (Pet. App. A, p. 13a) the conclusion which he reached (Pet. App. A, p. 14a) is inescapable:

> "As in *Prima Paint,* the entire contract, and not merely the arbitration clause, is in issue. The question of laches is intrinsic to the whole contract. Whether there was any inexcusable, unreasonable and prejudicial delay requires a fact-finding review of the entire contract and of all of the transactions occurring under it. It must be determined how the question of timeliness was affected by the conceded failure to meet the guarantee, by the efforts of the parties to solve the resulting problems, by the period of discussions between the parties, by the closing of the plant, by the changing conditions and circumstances, by the importance of the knowledge of the witness who moved to Australia, and by a host of other problems requiring a certain amount of expertise by the factfinders."

Trafalgar, supra, squarely holds that such a defense of laches is for the arbitrators, not the court. There is no "conflict" here to warrant review by certiorari.

III.

THE DECISION BELOW HAS NO "ADVERSE AND UNFAIR IMPACT ON PARTIES TO ALL EXISTING ARBITRATION CONTRACTS SUBJECT TO THE ACT."

The only "impact" of the decision below is upon the parties to this action. The only "impact" upon Halcon, the petitioner here, is that it must present to the arbitrators the evidence of its defense of laches which it otherwise had proposed to present to the district court. Irresponsible charges of "the destruction or loss of evidence crucial to a defense in the arbitration" (Pet. p. 16 will not suffice; the defense must be proved. Petitioner is not being "deprived" of a defense which it could have proved in the district court. As the court pointed out in *Trafalgar* (p. 572):

> "Moreover, in our view, laches is not a technical legal issue which only a judge is competent to decide. Rather, in the often esoteric field of commercial dealings, and in admiralty, it would seem that the severity of prejudice suffered through delay, and the reasonableness of excuses offered by the dilatory party, the elements of laches, might be resolved better where resort is had to the expertise of the arbitrators. Cf., Cohen & Drayton, *supra* at 281."

In *Prima Paint* this Court referred to

> "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." (p. 404)

and held:

> "Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. The question which Prima Paint requested

> the District Court to adjudicate preliminarily to allowing arbitration to proceed is one not intended by Congress to delay the granting of a § 3 stay."

The decision below fulfills the "unmistakably clear congressional purpose" not to delay the arbitration to which the parties had agreed. The petition for certiorari should be promptly denied so that the arbitration, delayed almost two years by petitioner's recalcitrance, may proceed promptly.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

HARLAN L. HACKBERT,
208 South LaSalle Street,
Chicago, Illinois 60604,
Attorney for Respondent.

Supreme Court, U.S.
FILED
OCT 23 1971
E. ROBERT SEAVER, CLERK

LIBRARY
SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1971

No. 71-388

HALCON INTERNATIONAL, INC.,

Petitioner,

against

MONSANTO AUSTRALIA LIMITED,

Respondent.

PETITIONER'S REPLY MEMORANDUM

EDWARD N. COSTIKYAN
Attorney for Petitioner
345 Park Avenue
New York, New York 10022

LLOYD W. BOWERS
SIDNEY S. ROSDEITCHER
SELVYN SEIDEL
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-388

HALCON INTERNATIONAL, INC.,

Petitioner,

against

MONSANTO AUSTRALIA LIMITED,

Respondent.

PETITIONER'S REPLY MEMORANDUM

1. Respondent suggests that this Court has already been presented with, and decided, the question presented by our Petition through its denial of certiorari in *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N.Y. 2d 576, *cert. denied,* 398 U.S. 939 (1970). That is not the fact.

The only question presented for review in *Dow Chemical* was whether federal or New York law governed an action in a New York court to restrain arbitration under a maritime contract where the claims sought to be arbitrated

were allegedly barred by the statute of limitations. Under New York law, the running of the statute of limitations on the claims under the main agreement was a valid defense to enforcement of the arbitration agreement. Under federal law, the running of the statute on the claims sought to be arbitrated *under the main agreement* was not a defense to enforcement of the *arbitration agreement.* No equitable defense of laches or estoppel was presented.* This Court was asked to pass only upon the correctness of the decision of the New York court that federal law applied. Certiorari was denied. The *Dow Chemical* case is thus wholly without significance here.

Respondent's citation of *Sears Roebuck & Co.* v. *Glenwal Co.,* 442 F.2d 1350 (2d Cir. 1971), *aff'd,* 325 F. Supp. 86 (S.D.N.Y. 1970) and *Ocean Industries, Inc.* v. *Soros Associates,* 328 F. Supp. 944 (S.D.N.Y. 1971), is puzzling since neither involved a defense of laches or estoppel, nor casts any light whatsoever on the issue here.

The fact remains that aside from the 2-to-1 decision in *Trafalgar Shipping Co.* v. *International Milling Co.,* 401 F.2d 568 (2d Cir. 1968)—and now the 2-to-1 decision in this case—no case has ever construed the Federal Arbitration Act to bar a federal court from considering whether laches in the invocation of the arbitration clause bars its enforcement. As our Petition points out, such a conclusion is inconsistent with *Prima Paint Corp.* v. *Flood & Conklin*

* The federal courts have long recognized a distinction between a defense that the statute of limitations barred claims under the main agreement, and a defense that laches in the invocation of the arbitration clause barred enforcement of the arbitration agreement. *Reconstruction Finance Corp.* v. *Harrisons & Crosfield,* 204 F.2d 366, 369-70 (2d Cir. 1953), *cert. denied,* 348 U.S. 819 (1953).

Mfg. Co., 388 U.S. 395 (1967), and the legislative history of the Act (Petition, pp. 7-11).

2. Respondent also incorrectly states that in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964), this Court held that in cases involving labor arbitration contracts the issue of laches was for the arbitrator, not the court (Brief in Opposition, p. 8). *Wiley* involved no such issue. The issue presented there was:

> "whether the courts or the arbitrator is the appropriate body to decide whether procedural prerequisites which, *under the bargaining agreement*, conditioned the duty to arbitrate have been met." 376 U.S. at 544. (Emphasis supplied.)

Similarly, the list of cases cited by respondent at page 9 of the brief in opposition* did not decide the question of whether laches was for the court or the arbitrator. Like *Wiley*, they involved assertions that there was a failure to comply with steps in the grievance procedure set out in the collective bargaining agreement. Each case thus involved interpretation of the collective bargaining agreement. The defenses of laches and estoppel exist wholly independent of procedures provided in the agreement and rest on principles of equity.

Both the Sixth Circuit decision in *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F.2d 586, 591-2 (6th Cir. 1967) and the Seventh Circuit decision in *Inter-*

* *Chambers* v. *Beaunit Corp.*, 404 F.2d 128 (6th Cir. 1968); *Local Union* v. *Illinois Power Co.*, 357 F.2d 916 (7th Cir. 1966); *Rochester Telephone Co.* v. *Communications Workers*, 340 F.2d 237 (2d Cir. 1965); *Porter Co.* v. *Local 37*, 400 F.2d 691 (4th Cir. 1968); *Local 148* v. *Interco, Inc.*, 415 F.2d 1208 (8th Cir. 1969); *Bealmer* v. *Texaco Inc.*, 427 F.2d 885 (9th Cir. 1970).

national Union of Operating Engineers v. *Flair Builders, Inc.*, 440 F.2d 557, 460 (7th Cir. 1971), specifically distinguished the *Wiley* line of cases on this ground. We have already explained at length why the decision below cannot be squared with *Ironall* or *Flair* (Petition, pp. 12-15). Respondent's citation of the *Wiley* line of cases is no answer.

We do, however, wish to call the Court's attention to a decision of the Fourth Circuit reported only recently, and after we had submitted our Petition. In *Tobacco Workers* v. *Lorillard Corp.*, C.C.H. Lab. Cas. ¶12,058 (4th Cir. Sept. 16, 1971), the Fourth Circuit did indeed create a conflict between itself and the Sixth and Seventh Circuits on the issue of whether, in an action to enforce a labor arbitration contract, laches is for the court or the arbitrator. Specifically acknowledging that the Sixth and Seventh Circuit decisions in *Flair* and *Ironall* were contra, the Fourth Circuit nevertheless held that in an action to enforce a labor arbitration contract under Section 301 of the Labor-Management Relations Act laches was for the arbitrator, not the court. In its view, the importance of labor arbitration as a means of resolving industrial strife compelled that result.*

The Fourth Circuit's decision in *Tobacco Workers* only underlines the need for Supreme Court review of the questions raised here. There is now an acknowledged conflict among the circuits as to whether the issue of laches is for the court or the arbitrator in an action to enforce a labor

* In support of its decision, the Fourth Circuit cited the Seventh Circuit's decision in the instant case. But the Court did not consider the effect of the "saving clause" of Section 2 of the Federal Arbitration Act in actions to compel commercial arbitration; nor was it called upon to do so. Section 301 of the Labor-Management Relations Act has no comparable provision.

arbitration contract. As already noted, in the area of commercial arbitration contracts that question was decided by the Second and Seventh Circuits by divided courts in which both Chief Judges dissented. Viewed in light of the *Tobacco Workers* decision, the Petition in this case raises even more urgently such important questions as: Whether there should be a single standard applicable to both commercial and labor arbitration contracts on the question of laches? If so, whether that standard should be the one applied in *Flair* and *Ironall,* or the one applied in *Tobacco Workers?* Whether the standard to be applied in labor cases is an appropriate standard in commercial cases? Whether in light of the "saving clause" in section 2 of the Federal Arbitration Act, and the special legislative history of the Federal Arbitration Act, the issue of laches should be for the court in commercial arbitration cases even if, because of the unique importance of arbitration in resolving industrial strife, laches is for the arbitrator in labor arbitration cases?

Accordingly, we believe this case presents an especially appropriate opportunity for the Court to review and resolve the questions raised by the Petition.

Respectfully submitted,

EDWARD N. COSTIKYAN
Attorney for Petitioner
345 Park Avenue
New York, New York 10022

LLOYD W. BOWERS
SIDNEY S. ROSDEITCHER
SELVYN SEIDEL
Of Counsel

October, 21, 1971

LIBRARY
MOTION FILED
DEC 15 1971

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-388

HALCON INTERNATIONAL, INC.,
Petitioner,

v.

MONSANTO AUSTRALIA LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE ANNEXED PETITION FOR REHEARING WHEN GROUNDS FOR PETITION AROSE AFTER EXPIRATION OF TIME PRESCRIBED IN RULE 58(2)

EDWARD N. COSTIKYAN
Counsel for Petitioner
345 Park Avenue
New York, New York 10022
(212) 935-8000

Of Counsel:
LLOYD W. BOWERS
SIDNEY S. ROSDEITCHER
SELVYN SEIDEL

December 14, 1971

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-388

HALCON INTERNATIONAL, INC.,

Petitioner,

v.

MONSANTO AUSTRALIA LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE ANNEXED PETITION FOR REHEARING WHEN GROUNDS FOR PETITION AROSE AFTER EXPIRATION OF TIME PRESCRIBED IN RULE 58(2)

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on November 9, 1971. As the annexed petition for rehearing shows, the ground for rehearing is that on December 7, 1971 this Court granted certiorari in *International Union of Operating Engineers* v. *Flair Builders, Inc.* No. 71-41, October Term, 1971, a case which involves issues in the area of labor arbitration identical with issues presented in this case in the area of commercial arbitration. The petition argues that this Court should reconsider its denial of certiorari in this case because it is desirable to have a simultaneous review of both *Flair* and this case.

As pointed out more fully in the annexed petition, simultaneous review will not only permit consideration of similar issues at the same time, but will also permit exploration and clarification of parallel policies of the Labor Management Relations Act and the Federal Arbitration Act. Moreover, we show that it would be manifestly unfair for this Court to affirm the decision in *Flair* without reversing the decision in the instant case. Finally, even if this Court reverses *Flair,* it may do so on a rationale which would nevertheless compel the reversal of the instant case.

Although the time for rehearing in this case expired on December 5, 1971, the ground on which rehearing is sought did not arise until December 7 with the grant of certiorari in *Flair.* We have submitted this petition as promptly as possible after learning of this grant of certiorari. In these circumstances, this Court clearly has the power, in its discretion and in the interests of justice, to entertain the petition. See, *e.g., Gondeck* v. *Pan American World Airways,* 382 U.S. 25 (1962); *United States* v. *Ohio Power,* 353 U.S. 98 (1955).

Respectfully submitted,

/s/ EDWARD N. COSTIKYAN

EDWARD N. COSTIKYAN
Counsel for Petitioner
345 Park Avenue
New York, New York 10022
(212) 935-8000

Of Counsel:
LLOYD W. BOWERS
SIDNEY S. ROSDEITCHER
SELVYN SEIDEL

December 14, 1971

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-388

HALCON INTERNATIONAL, INC.,

Petitioner,

v.

MONSANTO AUSTRALIA LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 9, 1971, and (2) granting the petition. Petitioner submits that this Court's grant of certiorari in *International Union of Operating Engineers* v. *Flair Builders, Inc.* No. 71-41, October Term, 1971, on December 7, 1971, is an intervening circumstance of substantial and controlling effect which justifies rehearing in this case.

The petition for certiorari in this case sought review of a 2-to-1 Seventh Circuit decision (1) holding that in an action to compel arbitration under the Federal Arbitration Act (9 U.S.C. §§1-14) the defense of laches in invoking arbitration was not for the court, but was for the arbitrator, and (2) refusing to apply its own recent decision in *International Union of Operating Engineers* v. *Flair Builders, Inc.*, 440 F.2d 557 (7th Cir. 1971) that in labor arbitration cases the issue of laches was for the court, on the reasoning that different policies under the Federal Arbitration Act and the Labor Management Relations Act purportedly justified this inconsistency. This Court's grant of certiorari in *Flair* provides a unique opportunity for this Court to resolve, once and for all, the similar issues arising in commercial and labor arbitration cases by reviewing this case simultaneously with *Flair*.

Review of *Flair* will necessarily involve this Court in a consideration of important issues common to both *Flair* and the instant case. Should there be a single standard applicable to both commercial and labor arbitration contracts on the question of laches? If so, should that standard be the one applied by the Seventh Circuit in *Flair*, or the one applied by the Seventh Circuit in this case? Is the standard to be applied in labor cases an appropriate standard in commercial cases? In light of the specific language in section 2 of the Federal Arbitration Act, and the special legislative history of the Federal Arbitration Act, should the issue of laches be for the court in commercial arbitration cases even if, because of the unique importance of arbitration in resolving industrial strife, laches is for the arbitrator in labor arbitration cases?

The time is particularly appropriate for resolving these issues as they affect commercial arbitration. Prior to this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the law was clear that in actions to enforce commercial arbitration contracts laches was for the court. Following *Prima Paint,* lower federal court judges have divided on the effect of *Prima Paint* on this issue. In the only appellate decisions, the Second and Seventh Circuits in 2-to-1 decisions read *Prima Paint* to support their conclusion that the issue is for the arbitrator. The Chief Judges in both circuits wrote dissents giving a contrary reading to *Prima Paint.*

Unless this Court hears the instant case together with *Flair,* an affirmance in *Flair* would result in a highly unsatisfactory situation in which different standards were applied in labor and commercial cases, and with the standard in commercial cases still unsettled under this Court's decision in *Prima Paint.* Even if this Court reverses *Flair,* there will still remain an unresolved question as to whether a similar result is warranted under the Federal Arbitration Act. On the other hand, by hearing and considering the instant case simultaneously with *Flair,* this Court will have an opportunity to resolve with finality the interrelated issues in these cases on as full and complete an argument as possible.

Under all these circumstances, reconsideration of the petition for certiorari is appropriate here. Indeed, this Court has on many occasions, subsequent to its denial of certiorari, reversed itself *sua sponte* when it granted review in a case raising the same or similar issues. *See, e.g.,*

United States v. *Ohio Power,* 353 U.S. 98, 99 (1955); *Bowden* v. *Fort Smith,* 316 U.S. 584, 589 (1942); *Helvering* v. *Sprouse,* 316 U.S. 604 (1942), 318 U.S. 604 (1942); *Douglas* v. *Willcuts,* 295 U.S. 722 (1935); *cf. Gondeck* v. *Pan American Airways,* 382 U.S. 25 (1962).

Conclusion

For the reasons set forth above, as well as those contained in its petition for writ of certiorari, petitioner prays that this Court grant rehearing of its order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

/s/ Edward N. Costikyan

Edward N. Costikyan
Counsel for Petitioner
345 Park Avenue
New York, New York 10022
(212) 935-8000

Of Counsel:
Lloyd W. Bowers
Sidney S. Rosdeitcher
Selvyn Seidel

December 14, 1971

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

/s/ EDWARD N. COSTIKYAN

EDWARD N. COSTIKYAN
Counsel for Petitioner